Supreme Court, U. S.
FILED
MAR 31 1977
MICHAEL RODAK, JR., CLERK

No. 76-1035

In the Supreme Court of the United States

OCTOBER TERM, 1976

BETHLEHEM STEEL CORPORATION, PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

ALFRED T. GHIORZI,
THOMAS A. PURSLEY, III,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1035

BETHLEHEM STEEL CORPORATION, PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 544 F. 2d 657.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1976 (Pet. App. 17). The petition for a writ of certiorari was filed on January 28, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Administrator of the Environmental Protection Agency is precluded under the Federal Water Pollution Control Act Amendments from issuing permits

extending beyond July 1, 1977, the date by which point sources are required to limit effluent discharges, using the best practicable control technology currently available.

STATEMENT

On December 31, 1974, the Environmental Protection Agency (EPA), Region III, issued a National Pollutant Discharge Elimination System (NPDES) permit to Bethlehem Steel Corporation. The permit was issued pursuant to Section 402 of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA Amendments), 86 Stat. 880, 33 U.S.C. (Supp.V) 1342, and set forth effluent limitations and compliance schedules for Bethlehem's iron and steel manufacturing facility in Bethlehem, Pennsylvania. The permit required Bethlehem, *inter alia*, to achieve certain effluent limitations, based upon the Administrator's view of the best practicable control technology currently available, by July 1, 1977 (see Pet. 4; Pet. App. 5a).

Although Bethlehem agreed with EPA's determination of the effluent limitations that could be achieved using the best practicable control technology currently available, it claimed that it would not be able to comply with those limitations by July 1, 1977. Bethlehem pursued a series of administrative appeals within EPA, seeking an extension of the July 1, 1977, compliance date (see Pet. 4-5). On September 30, 1975, the Administrator of EPA ruled that both the language of the FWPCA Amendments and the pertinent legislative history precluded the agency from extending the July 1, 1977, deadline in an NPDES permit (Pet. App. 25a-28a).

On December 29, 1975, Bethlehem filed a petition for review of the Administrator's decision with the United

States Court of Appeals for the Third Circuit (see Pet. 5). The parties thereafter entered into a factual stipulation acknowledging that Bethlehem had begun to install in its facility in Bethlehem, Pennsylvania, the best practicable control technology currently available—as required by Bethlehem's NPDES permit and Section 301 of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1311. The stipulation also acknowledged that, despite good faith efforts, Bethlehem could not complete installation of the technology contemplated by its NPDES permit before July 1, 1979, and therefore could not achieve the effluent limitations prescribed for July 1, 1977 (Pet. App. 30a-33a).

After having reviewed the terms and legislative history of the FWPCA Amendments, the court of appeals held that EPA was without authority to grant an extension of the July 1, 1977, compliance date. It also rejected the contention that, as so construed, the FWPCA Amendments deprives Bethlehem of the due process of law guaranteed by the Fifth Amendment (Pet. App. 1a-16a). The court therefore dismissed Bethlehem's petition for review (*id.* at 17a).

ARGUMENT

Section 301(b) of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1311(b), provides in pertinent part that "[i]n order to carry out the objective of this Act there shall be achieved * * * not later than July 1, 1977, effluent limitations for point sources * * * which shall require the application of the best practicable control technology currently available * * *." This provision imposes a mandatory, uniform deadline on the achievement of effluent limitations based upon use of the best practicable control technology currently

available. The vehicle chosen by Congress for application of such limitations in individual cases is the NPDES permit program, established pursuant to Section 402 of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1342. Neither Section 402, nor any other provision of the FWPCA Amendments, authorizes EPA to issue an NPDES permit extending the July 1, 1977, compliance date. As the court of appeals correctly concluded, the July 1, 1977, compliance date for effluent limitations based upon use of the best practicable control technology currently available is "a rigid guidepost" (Pet. App. 10a-11a).

Despite the unambiguous nature of Section 301(b) of the FWPCA Amendments, Bethlehem contends that the Administrator of EPA acted arbitrarily in refusing to extend the compliance date for its Bethlehem, Pennsylvania, facility beyond July 1, 1977. In support of that contention, Bethlehem points to the definition of "effluent limitation" contained in Section 502(11) of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1362. The phrase "effluent limitation" is defined in Section 502(11) to mean "any restriction established by a State or the Administrator [of EPA] on quantities, rates, and concentrations of * * * constituents which are discharged from point sources * * *, including schedules of compliance." According to Bethlehem, the fact that an effluent limitation encompasses "schedules of compliance" means that "the requirement of Section 301 can be met if, on July 1, 1977, a point source is on an approved and enforceable schedule of compliance which will require the completion of installation of best practicable control technology as expeditiously as practicable" (Pet. 11).

This construction of the FWPCA Amendments would render largely meaningless the specific compliance dates set forth in Section 301. Although an "effluent limitation" is defined broadly to include "schedules of compliance," the FWPCA Amendments do not leave the Administrator at large in determining what effluent limitations and schedules of compliance to impose. In the clearest of terms, Section 301(b) of the FWPCA Amendments requires that effluent limitations for point sources, requiring application of the best practicable control technology currently available, "shall be achieved * * * not later than July 1, 1977 * * *" (33 U.S.C. (Supp. V) 1311(b)). As the legislative history cited by the court of appeals demonstrates "all discussion of [the July 1, 1977] date * * * indicates that Congress viewed it as an inflexible target" (Pet. App. 11a).[1]

Bethlehem's suggestion (Pet. 8-9) that the Administrator's construction of the FWPCA Amendments exposes it to penalties in excess of $25 million provides no basis for a contrary construction conflicting both with the terms of the FWPCA Amendments and the associated legislative history. In any event, the suggestion assumes an unwarranted insensitivity on the part of EPA and the courts to possible enforcement actions. The stipulation signed by the parties (Pet. App. 30a-34a) doubtless would preclude a successful criminal action

---

[1]The legislative history of Section 502(11) of the FWPCA Amendments reveals that the phrase "schedules of compliance" was included in the definition of "effluent limitation" to make clear that control requirements would be more than narrative statements of obligation and to enable the Administrator of EPA to bring enforcement actions prior to July 1, 1977. S. Rep. No. 92-414, 92d Cong., 1st Sess. 41-42, 77 (1971).

against Bethlehem for willful or negligent violation of the FWPCA Amendments, and would make a civil enforcement action by EPA highly unlikely (see Pet. App. 6a). Moreover, even if a citizen suit were brought pursuant to Section 505 of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1365, there is no reason to believe that the court would refuse to take into account Bethlehem's peculiar circumstances in fashioning appropriate relief. If an enforcement action were brought against Bethlehem, and penalties were imposed, Bethlehem could raise the due process arguments alluded to in its petition (Pet. 12). But at present, those arguments are at best premature.

The relief Bethlehem seeks can come only from Congress.[2] See *Union Electric Co.* v. *Environmental Protection Agency*, 427 U.S. 246; *City of Santa Rosa* v. *Environmental Protection Agency*, 534 F. 2d 150 (C.A. 9), judgment vacated and remanded *sub nom. Pacific Legal Foundation* v. *Environmental Protection Agency*, No. 75-1875, December 6, 1976; *State Water Control Board* v. *Train*, 424 F. Supp. 146 (E.D. Va.), appeal pending, C.A. 4, No. 76-1320. Congress has demanded compliance by July 1, 1977, with effluent limitations based upon application of the best practicable control technology currently available. EPA has done no more than implement that mandate in the NPDES permit issued to Bethlehem.

---

[2]In fact, a bill presently is pending before Congress that would extend the compliance date for publicly-owned treatment facilities beyond July 1, 1977 (H.R. 3199). Although that bill, if enacted in its present form, would not benefit Bethlehem, it does indicate that Congress is aware of problems that are developing with respect to the July 1, 1977, compliance date.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

ALFRED T. GHIORZI,
THOMAS A. PURSLEY, III,
Attorneys.

MARCH 1977.